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IN THE
COURT OF APPEALS OF INDIANA

DAVID R. JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A01-0605-CR-192
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William Sleva, Judge
Cause No. 47D02-0403-FA-203

June 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

David R. Jones appeals his sentence, entered upon his guilty plea, for class B felony Dealing Cocaine.[1] The trial court sentenced Jones to twenty years in prison. Jones presents the following restated issues for review:

1. Did the trial court violate *Blakely v. Washington* when it enhanced Jones's sentence to the maximum sentence for a class B felony?

2. Is Jones's sentence inappropriate in light of his character and the nature of his offenses?

We affirm.

On March 16, 2004, police obtained a search warrant, based on information provided by a confidential informant, to search Jones's home. During the search, police discovered 43 grams of cocaine.

On March 18, 2004, the State charged Jones with class A felony dealing cocaine. On August 15, 2005, Jones entered a negotiated plea agreement whereby he agreed to plead guilty to a lesser charge of class B felony dealing cocaine. By the terms of the plea agreement, sentencing was left to the trial court. On February 21, 2006, the trial court sentenced Jones to twenty years in prison, with five years suspended to supervised probation. This appeal ensued.

1.

Jones first asserts on appeal that the trial court abused its discretion in sentencing him to the maximum possible sentence for a class B felony. Specifically, Jones claims that the trial court gave "undue weight to Jones's unrelated criminal history", failed to

[1] Ind. Code Ann. § 35-48-4-1(West, PREMISE through 2006 2nd Regular Session).

find any mitigating factors, and "considered an improper aggravating factor under *Blakely*." *Appellant's Brief* at 5.

Because of the timing of events in this case, before addressing Jones's sentence, we must briefly discuss recent changes in Indiana's statutory sentencing scheme. In 2004, the United States Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), an opinion that called into question the constitutionality of Indiana's determinative statutory scheme. *Primmer v. State*, 857 N.E.2d 11 (Ind. Ct. App. 2006), *trans. denied*. Our legislature responded to *Blakely* by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. *Id*.

The instant case presents an unusual factual scenario because, while Jones both entered his guilty plea and was sentenced after our legislature adopted our current post-*Blakely* "advisory" sentencing scheme, the offense actually occurred before that in March of 2004. Our Supreme Court has not yet resolved the issue of whether Indiana's revised "advisory" sentencing scheme should be applied retroactively. This court, however, has generally concluded that the former "presumptive" sentencing scheme applies, and thus *Blakely* applies, if a defendant committed a crime before April 25, 2005, but was sentenced after that date. *See* e.g., *Creekmore v. State*, 853 N.E.2d 523 (Ind. Ct. App. 2006) (concluding that the relevant date for *ex post facto* purposes is the date of the *commission* of the crime for which a defendant is being convicted, not the date of the conviction itself); *Weaver v. State*, 845 N.E.2d 1066 (Ind. Ct. App. 2006) (holding that the sentencing statute in effect at the time of the offense, rather than at the time of the

conviction or sentencing, controls), *trans. denied*; *but see Samaniego-Hernandez v. State*, 839 N.E.2d 798 (Ind. Ct. App. 2005) (concluding that the change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of the advisory sentencing scheme is proper when the defendant is sentenced after the effective date of the amendment even though the offense was committed before the amendment date). We therefore review Jones's claims pursuant to the statutory scheme that was in effect at the time of the offense, and further conclude that the *Blakely* rule applies in this case.

Having determined that *Blakely* and our former "presumptive" statutory scheme applies in the present case, we now turn to Jones's multiple claims of sentencing errors. It is well established that sentencing decisions lie within the trial court's discretion. *Williams v. State*, 861 N.E.2d 714 (Ind. Ct. App. 2007). Those decisions are given great deference on appeal and will be reversed only for an abuse of discretion. *Golden v. State*, 862 N.E.2d 1212 (Ind. Ct. App. 2007). Moreover, the broad discretion of the trial court includes the discretion to determine whether to increase the presumptive sentence, to impose consecutive sentences, or both. *Jones v. State*, 807 N.E.2d 58 (Ind. Ct. App. 2004), *trans. denied*.

Jones pleaded guilty to class B felony dealing cocaine. The relevant sentencing statute in place at the time of the offense provided that a person who committed a class B felony "shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." Ind. Code Ann. § 35-50-2-5 (West 2004). The trial court

sentenced Jones to twenty years executed, with five years suspended to supervised probation. Even though Jones's sentence was authorized by statute, he argues the trial court abused its discretion by imposing the maximum sentence for a class B felony for several reasons.

First, Jones claims that the trial court gave undue weight to his criminal history, arguing that "the only prior criminal history the trial court could consider was the 1965 theft to which Jones stipulated . . . and the 2001 class A misdemeanor operating while intoxicated . . . conviction. The operating while intoxicated as a class D felony . . . was still pending at the time of Jones'[s] sentencing in this cause . . . and therefore could not be considered." *Appellant's Appendix* at 8.

We observe that *Blakely* left intact the trial court's authority to determine whether facts alleged and found are sufficiently substantial and compelling to warrant imposing an exceptional sentence. *Morgan v. State*, 829 N.E.2d 12 (Ind. 2005). Thus, when enhancing a sentence, the trial court must: (1) identify significant aggravating and mitigating circumstances, (2) state the specific reasons why each circumstance is aggravating or mitigating, and (3) evaluate and balance the mitigating circumstances against the aggravating circumstances to determine if the mitigating circumstances offset the aggravating circumstances. *Trowbridge v. State*, 717 N.E.2d 138 (Ind. 1999). In addition, one valid aggravator alone is enough to enhance a sentence. *Minter v. State*, 858 N.E.2d 696 (Ind. Ct. App. 2006).

The extent, if any, that a sentence should be enhanced turns on the weight of an individual's criminal history, which is measured by the number of prior convictions and

their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability. *Duncan v. State*, 857 N.E.2d 955 (Ind. 2006).

The trial court made the following pertinent statements pertaining to Jones's criminal history during the sentencing hearing:

> I am sentencing on a "B" Felony. It was originally an "A" . . . . From your prior record, I cannot say that you are not likely to have any further law violations. . . . I am making the following findings for aggravating circumstances. You do have a prior criminal history. The criminal history goes back to 1965, ah, that was a conviction, I believe, for the Theft. The conspiracy was a conviction, it's hard for me to tell. The DUI, I mean, a lot of these from '71 to '77, it's hard for me to tell if these are convictions, *so I can't make that finding*.[2] The first conviction I'm certain of is the . . . it's not 2002, it's an '88 DUI. There is a 2000 DUI, ah, and then there is the 2001 felony DUI. So there is a prior criminal history.

Transcript at 71-72 (emphasis supplied). It is clear from this statement that, in finding Jones had a substantial criminal history consisting of multiple drug/alcohol convictions, the trial court properly disregarded the nine charges brought against Jones between 1971-1978 because of the incomplete presentence report. *See Duncan v. State*, 857 N.E.2d 955 (holding only convictions are permissible as criminal history).

The trial court did observe, however, that Jones's criminal history began as early as 1965, and while the trial court recognized that Jones went for a long period of time

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[2] For reasons unknown to this court, the presentence report that detailed all of Jones's prior arrests and convictions contained ten separate entries from 1965 to 1978 for various offenses including theft, several DUIs and public intoxication charges, carrying a concealed weapon, and criminal confinement. The presentence report did not, however, indicated the ultimate disposition of these charges. Instead, the report simply read, "Dispo archived." *Appendix to Appellant's Brief* at 110 - 111. This ambiguous entry caused much confusion as to Jones's true record of convictions, both for the trial court and this court. The record clearly shows that, because of this ambiguity, the trial court properly disregarded all these entries when it determined what sentence to impose. *See Duncan v. State*, 857 N.E.2d 955 (concluding only prior convictions may be considered for purposes of enhancing a defendant's sentence). There also appears to be a typographical error in the date listed for a 1988 DUI conviction. The trial court noted the 1988 conviction, but recognized the inconsistency with the date in its oral sentencing statement.

without a substantial law violation, Jones had been convicted on three more recent drug/alcohol related offenses, including driving while intoxicated in 1988, operating without a license in 2000, and felony operating while intoxicated in 2001. Based on the foregoing, we cannot conclude that the trial court erred in finding Jones's criminal history constituted a significant aggravating factor. Jones had at least four criminal convictions, three of which were close in proximity to the present offense and involved drug/alcohol related offenses.

Jones next complains that the trial court did not find any mitigating circumstances. He asserts that the trial court abused its discretion in that regard, and claims the trial court should have found several mitigating circumstances.

Determining mitigating circumstances is within the discretion of the trial court. *Corbett v. State*, 764 N.E.2d 622 (Ind. 2002). A trial court does not err in failing to find mitigation when a mitigation claim is "highly disputable in nature, weight, or significance." *Smith v. State*, 670 N.E.2d 7 (Ind. 1996). We further observe that the trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *Corbett v. State*, 764 N.E.2d 622. Nor is the trial court required to give the same weight to proffered mitigating factors as the defendant does. *Id*. Additionally, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Id*. The failure to find mitigating circumstances that are clearly supported by the record, however, may imply that they were overlooked and not properly considered. *Id*. An allegation that the trial court failed to identify or find a mitigating

factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id*.

Jones first asserts the trial court abused its discretion when it failed to find as mitigating the death of his wife, which, according to Jones, led to his use of and ultimate addiction to cocaine. This allegation, however, does not comport with the evidence. The State adeptly points out that Jones's wife died in an automobile accident in 1998 or 1999[3], approximately 5 years prior to his current offense. Additionally, Jones admitted that he did not begin using cocaine until approximately "a year or so prior to my arrest" for the current offense. *Transcript* at 48. The trial court, in considering Jones's allegation that the death of his wife should be viewed as a significant mitigating factor, made the following observations:

> [T]here is nothing to indicate that there are any substantial grounds, whatsoever, for you to deal cocaine. The use of cocaine, probably, I can understand that, but not the drug dealing. I see, I see hundreds of people a year, Mr. Jones, who have terrible things occur in their lives - and I'm not saying that what you had happen haven't [sic] been terrible things - your wife dying and the accident in the early '90s. That's one thing. Most people, luckily, most people do not resort to dealing a dangerous and serious drug. Most people don't resort to possessing over forty grams of this drug. As well as maintain a location where people can engage in drug activity. So, I'm not making that finding. There is absolutely no grounds for me to make that mitigating finding.

Transcript at 69-70. Based on the foregoing, it is clear that the trial court considered and rejected Jones's assertion that his wife's death should be considered a significant mitigating factor in this case. As stated earlier, the trial court is not obligated to accept a

[3] There is a discrepancy in the record as to the exact date of Jones's wife's death. The presentence report indicates she died in 1999, but Jones testified during the sentencing hearing that she died in April of 1998.

defendant's arguments as to what constitutes a mitigating factor. *Corbett v. State*, 764 N.E.2d 622.

In a related argument, Jones asserts that his drug addition should have been deemed a mitigating factor. In failing to give Jones's addiction any mitigating weight, the trial court stated:

> Mr. Jones, this isn't just possession and use of cocaine. I mean, possession in and of itself is a serious offense, but I'm fully aware there are people who are addicted, have problems staying way from illegal drugs. I'm fully aware of that and I know long-term treatment is necessary. That is much different, in my mind than someone who possesses forty-three grams, which is at least fourteen times what is needed to make it an "A" felony. An "A" Felony is three grams of cocaine. . . . I rarely see this much cocaine. And not only that, this is a dealing case, it's not just use and abuse of cocaine. It is providing cocaine to others. It's providing a drug which causes others to have their lives ruined.

Transcript at 68-69. The trial court adequately explained, even though it was not required to do so, why it did not consider Jones's drug addition to be a significant mitigating factor. Indeed, contrary to Jones's assertion on appeal, a history of substance abuse is sometimes found by the trial court to be an aggravator, not a mitigator. *Iddings v. State*, 772 N.E.2d 1006 (Ind. Ct. App. 2002), *trans. denied*.

Finally, Jones claims that the fact there was a substantial period of time when he went without an offense should have been found to be mitigating. While it is true that when determining whether a defendant's criminal history constitutes a significant aggravating circumstance, the trial court must consider the proximity of the past convictions to the present offense, *see Trowbridge v. State*, 717 N.E.2d 138, Jones failed to provide this court with any cogent argument, or citation to authority, as to why his lack

of contact with police many years ago should have been deemed a significant mitigating factor, in light of his three drug/alcohol related convictions in 1988, 2000, and 2001. *See* Ind. Appellate Rule 46(A)(8)(a) (appellant's arguments on appeal must be supported by cogent reasoning, citations to the authorities, statutes, and appendix or parts of the record on appeal relied on). We therefore conclude that, once again, the trial court acted within its discretion when it chose not to find as mitigating the fact that Jones had a period of time when he did not have contact with the police. *See Iddings v. State*, 772 N.E.2d 1006 (concluding that defendant's enhanced sentence was not an abuse of discretion where trial court relied on defendant's criminal history, even though there was a seventeen-year period without criminal activity, and where defendant had a substance abuse problem); *see also Harris v. State*, 396 N.E.2d 674 (Ind. 1979) (stating that with regard to prior convictions, while remoteness in time should be taken into account, *remoteness in time, to whatever degree*, does not render a prior conviction irrelevant).

Jones next asserts that the trial court improperly found as aggravating (1) that he possessed 43 grams of cocaine and provided a place for people to engage in drug use, and (2) that he committed the current offense while on bond awaiting trial on a separate class D felony driving while intoxicated charge, because neither fact was properly proven under *Blakely*.

In *Blakely*, the Supreme Court opined that '"[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" 542 U.S. at 301 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

Consequently, our Indiana Supreme Court has held that, other than the fact of a prior conviction, pursuant to *Blakely*:

> [A] trial court . . . may enhance a sentence based solely on those facts that are established in one of several ways: (1) as a fact of prior conviction; (2) by a jury beyond a reasonable doubt; (3) when admitted by a defendant; and (4) in the course of a guilty plea where the defendant has waived *Apprendi* rights and stipulated to certain facts or consented to judicial factfinding.

Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005) (emphasis supplied).

As for Jones's assertion that the trial court improperly relied on the facts that he possessed 43 grams of cocaine and provided a place for people to engage in drug use, Jones's argument fails. During the sentencing hearing, Jones made the following pertinent statements during questioning by Defense counsel:

> Q: Okay . . . . Now, um, there was testimony from Detective Slone that there was forty-three (43) grams of cocaine found in your house. Can you tell me what was your daily habit? . . .
>
> [Jones]: Probably five to six grams.
>
> * * * *
>
> Q: And you've admitted to having sold cocaine to some of these people that come to your house. In what amounts would you sell it to them?
>
> [Jones]: I sold, sold it to Lena in, in, ah, seven grams at a time.
>
> Q: Seven grams at a time. Now was, was that cocaine that she would then use there at your house with you or would she take it away with her, what would she do?
>
> [Jones]: Use some and take some away. Lena lived with me for awhile.

Transcript at 47. Additionally, during cross-examination, when Jones was asked, "When you were arrested you had some forty-three (43) grams of cocaine in your possession, is that right?", he responded "Right." *Id.* at 57. Jones also admitted that when he was arrested for the current offense, there were three people involved in the drug activity at his house. Jones's statements, made under oath during the sentencing hearing, constitute admissions under *Blakley* and were properly relied upon by the trial court.

With regard to Jones being out on bond, the presentence report clearly indicated that Jones was out on bond for a class D felony operating while intoxicated charge at the time he committed the current offense. Jones never admitted this fact, however, nor did he consent to judicial factfinding regarding this issue, and the fact that Jones failed to object to the presentence investigation report does not constitute an admission. *See Ryle v. State*, 842 N.E.2d 320 (Ind. 2005) (concluding that using a defendant's failure to object to a presentence report to establish an admission to the accuracy of the report implicates the defendant's Fifth Amendment right against self incrimination). Thus, according to *Blakely*, Jones is correct in his assertion that the trial court should not have relied on the fact that Jones was out on bond at the time of the current offense as an aggravating factor. *See Duncan v. State*, 857 N.E.2d 955 (Ind. 2006) (holding only convictions are permissible as criminal history). This error, however, does not necessarily mandate reversal. "When a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentencing enhancement may still be upheld." *Hatchett v. State*, 740 N.E.2d 920, 929 (Ind. Ct. App. 2000), *trans. denied*.

Our review of the record leaves this court convinced that the trial court adequately considered and balanced the aggravating circumstances along with the proffered mitigating circumstances when sentencing Jones. Likewise, even though the trial court improperly relied upon the fact that Jones was on bond when he committed the current offense, said error was harmless. When one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed. *Merlington v. State*, 814 N.E.2d 269 (Ind. 2004). We may affirm if the sentencing error is harmless. *Id*. Additionally, one valid aggravating circumstance is enough to support an enhanced sentence. *Hatchett v. State*, 740 N.E.2d 920. Based on the foregoing, and in light of the trial court's determination of other aggravating circumstances, including Jones's criminal history, we find the error harmless.

2.

Jones next asserts that his sentence is inappropriate in light of the nature of the offense and his character. Under article VII, section 6 of the Indiana Constitution, this court has the constitutional authority to review and revise sentences. *Smith v. State*, 839 N.E.2d 780 (Ind. Ct. App. 2005). We will not do so, however, unless the sentence "is inappropriate in light of the nature of the offense and the character of the offender." *Martin v. State*, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003); Ind. Appellate Rule 7(B) (2007). While we must give due consideration to the trial court's sentence because of the special expertise of the trial court in making sentencing decisions, App. R. 7(B) is an

authorization to revise sentences when certain broad conditions are satisfied. *Smith v. State*, 839 N.E.2d 780.

Jones invites us to revise his sentence under App. R. 7(B), contending that his sentence was excessive in light of his character, and the nature of his offense. In so doing, however, Jones simply restates and repeats his claims that no consideration was given to his proffered mitigating circumstances, and that his criminal history was not substantial enough to warrant enhancing his sentence. He provides no additional mitigating argument or insight regarding the nature of the offense or his character. As we explained previously, we are not persuaded that the trial court abused its discretion in either its identification or evaluation of the aggravating circumstances, and conclude that Jones' sentence was not excessive considering his character and the nature of his offense.

This court exercises great restraint in revising the trial court's sentence in light of the trial court's special expertise in making sentencing decisions. *Frankosky* v. *State*, 857 N.E.2d 1049 (Ind. Ct. App. 2006). While we recognize that Jones's criminal history was not the most egregious, Jones has failed to carry his burden of establishing, in light of the nature of his offenses or his character, that the trial court's sentence is inappropriate. *See McMahon v. State*, 856 N.E.2d 743 (Ind. Ct. App. 2006) (holding that the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate). Jones's sentence, which was reduced pursuant to a plea agreement from a class A felony to a class B felony, was not excessive considering either the nature of his offense or his character.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.